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AFSCME Council 5, Local 3558 and St. Luke's Hospital of Duluth, Inc. d/b/a St. Luke's Home Care. Case 18-CB-149410

June 10, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

Upon a charge filed April 3, 2015,¹ by St. Luke's Hospital of Duluth, Inc. d/b/a St. Luke's Home Care (the Employer), the General Counsel issued a complaint and notice of hearing on May 28 alleging that AFSCME Council 5, Local 3558 (the Respondent) has been violating Section 8(b)(3) of the Act by failing and refusing to bargain collectively and in good faith with the Employer. On June 10, the Respondent filed an answer in which it denied the commission of any unfair labor practices and asserted various affirmative defenses.

On August 26, the Respondent, the Employer, and the General Counsel filed a joint motion to waive a hearing by an administrative law judge and to submit this case to the Board for a decision based on a stipulated record. On February 5, 2016, the Board granted the parties' joint motion. Thereafter, the Respondent, the Employer, and the General Counsel filed briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation with an office and place of business in Duluth, Minnesota, has been engaged in the operation of an acute care hospital and has provided a variety of other health care services, including home health care. In conducting its operations during the calendar year ending December 31, 2014, the Employer purchased and received at its Duluth, Minnesota facility goods and services valued in excess of \$50,000 directly from points outside the state of Minnesota. The Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

¹ All subsequent dates are in 2015 unless otherwise noted.

At all material times, the Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

The Employer and the Respondent had been parties to successive collective-bargaining agreements, most recently from January 1, 2012, to December 31, 2014, in which the Employer recognized the Respondent as the exclusive bargaining agent for a unit composed of all homemakers and technicians who work, or are anticipated to work, an average of 4 or more hours per week over a 13-week period.² This agreement contained a provision for arbitration of contracts, which read in relevant part:

ARTICLE 21

Arbitration of Contracts

Section 21.1. Interest Arbitration

In the event the parties are unable to reach agreement as to the terms of a succeeding Labor Agreement, any unsettled issue shall, upon the request of either party, be submitted to the determination of a board of arbitrators, whose determination shall be final and binding upon the parties. . . .

Section 21.2. Selection of Arbitrators

. . .

The parties recognize that by custom an arbitrator is not ordinarily given power to add to or vary from the previously written contract of the parties. In this case, however, the parties expect the arbitrator to supply agreement and language of agreement in a new contract in those areas where the parties themselves have been unable to come to express agreement.

. . .

Section 21.3. Continuation of Interest Arbitration

The provisions of this Article (XXI) shall be in full force and effect during the entire term of this agreement and shall apply and be utilized by the parties to reach agreement as to the terms of a succeeding Labor

² The unit consists of:

All homemakers and technicians employed by the Employer at or out of its 810 East 4th Street, Duluth, Minnesota facility who work an average or are anticipated to work an average of four or more hours per week over a 13-week period; excluding RNs and LPNs, Office Clerical Employees, Therapists, Therapist Assistants, Guards and Supervisors, as defined in the National Labor Relations Act.

Agreement in the event the parties are otherwise unable to reach agreement through negotiations. The arbitration panel in rendering its decision shall incorporate therein a provision that this arbitration clause (Article XXI) shall be a part of the succeeding contract, unmodified, except the arbitration panel may impose an expiration date on the provisions of this Article XXI for any Labor Agreement expiring during or after the calendar year 2005.

After the expiration of this contract, the parties negotiated for a new collective-bargaining agreement and agreed on all provisions except for whether to include interest arbitration (Article 21). The Employer proposed removing the interest arbitration provision, but the Respondent insisted on its inclusion in the new agreement. Following the parties' last bargaining session on March 11, the Respondent sought to invoke Article 21 of the expired agreement and submit its proposed inclusion of the interest arbitration clause to an arbitrator. On March 31, the Respondent confirmed by email to the Employer that interest arbitration was the only remaining issue.

B. Discussion

Under Section 8(d) of the Act, an employer and employee representative are required to bargain in good faith over wages, hours, and other terms and conditions of employment. There is no statutory duty to bargain over other subjects, however, and it is a violation of the Act "to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining." *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). For permissive subjects of bargaining, "each party is free to bargain or not to bargain, and to agree or not to agree." *Id.*

The Board has long held that an interest arbitration provision "does not come within the classification of a mandatory subject of bargaining [as] . . . [i]t does not vitally affect the terms of wages, hours, or other conditions of employment in the contract being negotiated." *Columbus Printing Pressmen & Assistants' Union No. 252*, 219 NLRB 268, 279 (1975), *enfd.* 543 F.2d 1161 (5th Cir.1976).³ Because interest arbitration is a permissive subject of bargaining, it is a violation of the Act to bargain to impasse over interest arbitration. *Id.* at 282.⁴

³ Accord *Connecticut State Conference Board, Amalgamated Transit Union (H.N.S. Management Co.)*, 339 NLRB 760, 767 (2003) (interest arbitration is permissive bargaining subject); *Laidlaw Transit Inc.*, 323 NLRB 867, 869 (1997); *Tampa Sheet Metal Co. Inc.*, 288 NLRB 322, 325 (1988); *Sheet Metal Workers Local 38 (Elmsford Sheet Metal Works)*, 231 NLRB 699, 701 (1977), *enfd.* 575 F.2d 394 (2d Cir. 1978).

⁴ Accord *Connecticut State Conference Board*, above at 768 (union insisted to impasse on interest arbitration provision in violation of Sec.

Here, the Respondent acknowledged that interest arbitration is a permissive subject of bargaining and admitted that it bargained to impasse solely over its inclusion in a successor contract. Accordingly, we find that by insisting to impasse over a permissive subject of bargaining, the Respondent failed and refused to bargain in good faith, in violation of Section 8(b)(3).

CONCLUSIONS OF LAW

1. The Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The Respondent has been a labor organization within the meaning of section 2(5) of the Act.

3. The Respondent has been failing and refusing to bargain in good faith with the Employer by insisting on the inclusion of an interest arbitration provision as a condition of reaching a collective-bargaining agreement, in violation of Section 8(b)(3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(b)(3) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, AFSCME Council 5, Local 3558, Duluth, Minnesota, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with St. Luke's Hospital of Duluth, Inc. d/b/a St. Luke's Home Care (the Employer) by insisting on the inclusion of an interest arbitration provision as a condition of reaching a collective-bargaining agreement.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Employer over terms and conditions of employment in the following appropriate bargaining unit, and, if an understanding is reached, embody the understanding in a signed agreement.

8(b)(3)); *Sheet Metal Workers' International Association, Local Union No. 359*, 319 NLRB 668, 670 (1995); *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43, 45 (1984) ("[I]nterest arbitration is a nonmandatory subject of bargaining which, even if agreed to, is unenforceable insofar as it purports to resolve the inclusion of . . . interest arbitration in a successor collective-bargaining agreement.").

All homemakers and technicians employed by the Employer at or out of its 810 East 4th Street, Duluth, Minnesota facility who work an average or are anticipated to work an average of 4 or more hours per week over a 13-week period; excluding RNs and LPNs, Office Clerical Employees, Therapists, Therapist Assistants, Guards and Supervisors, as defined in the National Labor Relations Act.

(b) Notify the Employer that the Respondent Union will not fail and refuse to bargain in good faith by insisting on the inclusion of an interest arbitration provision as a condition of reaching a collective-bargaining agreement.

(c) Within 14 days after service by the Region, post at its Duluth, Minnesota facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 14 days after service by the Region, deliver to the Regional Director for Region 18 signed copies of the notice in sufficient number for posting by the Employer at its Duluth, Minnesota facility, if it wishes, in all places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 10, 2016

Mark Gaston Pearce, Chairman

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with St. Luke's Hospital of Duluth, Inc. d/b/a St. Luke's Home Care (the Employer) by insisting on the inclusion of an interest arbitration provision as a condition of reaching a collective-bargaining agreement with the Employer.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed to them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Employer over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL notify the Employer that we will not fail and refuse to bargain in good faith by insisting on the inclusion of an interest arbitration provision as a condition of reaching a collective-bargaining agreement with the Employer.

AFSCME COUNCIL 5, LOCAL 3558

The Board's decision can be found at www.nlr.gov/case/18-CB-149410 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

